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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

RONALD W. ROSENBERGER, *et al.*,
Petitioners,

v.

THE RECTOR AND VISITORS OF THE
UNIVERSITY OF VIRGINIA, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

BRIEF OF INTERCOLLEGIATE STUDIES INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF INTERCOLLEGIATE STUDIES INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICUS CURIAE*

Amicus Intercollegiate Studies Institute ("ISI") supports the petitioners and urges the Court to reverse the decision of the United States Court of Appeals for the Fourth Circuit. Pursuant to Supreme Court Rule 37.3, ISI has obtained consent to file this brief from counsel for petitioners and counsel for respondents. Correspondence indicating the parties' consent has been filed with the Clerk.

ISI is a nonprofit, nonpartisan, tax-exempt organization that was founded in 1953 to instill among college students an understanding of the values and institutions

that sustain a free society and to nurture in these future leaders an allegiance to the American ideal of ordered liberty. Through an integrated program of lectures, conferences, publications, and fellowships, ISI fosters student appreciation of our Nation's founding principles of limited government, individual liberty, personal responsibility, free enterprise, and moral standards.

ISI maintains a network of more than fifty thousand members and volunteer representatives that reaches nearly every college campus in the United States. Each year, over twenty-five hundred ISI student members and faculty associates assist in the organization of ISI-sponsored activities on more than one thousand college campuses.

ISI publishes four journals—one written entirely by college students—with an annual circulation of more than 850,000 copies. ISI also publishes books, texts, and reprints by leading scholars and authors. In addition, ISI annually awards tuition and stipend fellowships to graduate students who are committed to perpetuating our Nation's heritage by teaching liberal arts at the undergraduate level. To date, nearly four hundred educators have benefitted from these fellowships.

ISI annually sponsors over three hundred lectures at colleges and preparatory schools. ISI also sponsors approximately forty conferences each year, including four regional leadership conferences and two summer schools. ISI's efforts to bring noted speakers to campuses are frequently thwarted, however, when schools refuse to subsidize the speakers' fees because of the religious or political content of the speakers' proposed comments.

As a nationally prominent student-oriented organization, ISI has a compelling interest in addressing the Free Speech and Establishment Clause issues raised by the court of appeals' decision from the perspective of the thousands of college and university students who are directly affected by the decisions of school administrators and committees that may restrict political, religious, and

philosophical expression by students. Academic freedom is central to ISI's program and philosophy and is necessary for their propagation. Decisionmaking by school administrators that restricts student free speech solely for viewpoint-based reasons is anathema to ISI's philosophy and injurious to ISI's program.

The court of appeals' decision not only permits, but virtually compels, the University of Virginia to abridge the free speech rights of a student organization founded in accordance with University guidelines. Those guidelines bar this otherwise eligible organization from receiving reimbursement from a pool of fees collected for the very purpose of repaying student organizations for the costs of publications and other campus activities. Accordingly, ISI supports petitioners in urging the Court to reverse the judgment below.

STATEMENT OF THE CASE

On July 11, 1991, petitioners Ronald W. Rosenberger, et al., brought an action against the Rector and Visitors of the University of Virginia and Associate Dean of Students Ronald J. Stump ("respondents" or "the University") pursuant to 42 U.S.C. § 1983. Petitioners are University students who challenge the constitutionality of the University's guidelines for the distribution of monies from the University's Student Activities Fund ("SAF" or "the Fund"). The University collects a mandatory student activities fee from all students, deposits the fees into the SAF, and then, via approval of the University's Student Council, disburses the monies to support "the wide variety of student organizations, activities, and publications that function at the University." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 18 F.3d 269, 270 (4th Cir.), *cert. granted*, 115 S. Ct. 417 (1994). If the Student Council disapproves the funding request, an appeal may be made to the Student Activities Committee, chaired by a designee of the Vice President for Student Affairs,

which makes a final decision. *Id.* at 271; J.A. 75-76.[1] Funds do not go directly to student organizations, but rather are used only to reimburse expenses incurred by those organizations. *Rosenberger*, 18 F.3d at 271.

In September 1990, petitioners formed Wide Awake Productions. This student organization published *Wide Awake*, a magazine designed to facilitate "philosophical and religious expression" on campus. *Id.* During the 1990-91 academic year, the University funded through reallocated student fees fifteen student publications that promoted diverse viewpoints (*Id.* at 271 & n.3)[2] but denied Wide Awake Productions' request for reimbursement of the expenses the students incurred in printing *Wide Awake*. The University admittedly singled out Wide Awake Productions for discriminatory treatment because the guidelines broadly forbid the allocation of funds to "religious activities." *Id.* at 273-74.

Although disqualifying Wide Awake Productions for funding because of its "religious activities" (J.A. 81), the Associate Dean of Students acknowledged that the "Student Council has funded publications and media groups which have expressed religious opinions and similar matter[s] as an incidental part of their activities" (J.A. 103). The same official could not quantify the difference between Wide Awake Productions and other student organizations in their degree of religious activity, but asserted that the "reason for these groups' existence and the nature of the activities themselves are not to evangelize or to *principally* express a religious perspective." J.A. 103 (emphasis added). As the official's statment suggests, any difference between Wide Awake Productions and funded

[1] "J.A." citations are to the Joint Appendix filed with the court of appeals below.

[2] In addition, over 100 student organizations, including the Muslim Students Association and the Jewish Law Students Association, also obtained expense reimbursement from the Fund during the relevant time period. *Rosenberger*, 18 F.3d at 271.

student organizations in regard to expressions from a religious perspective or viewpoint appears to be more a matter of degree than content of religious thought. *See* J.A. 116, 119 (stating that the objective of the Muslim Students Association is "to promote a better understanding of Islam"); J.A. 122 (discussing a lecture on "Judaism and Homosexual Rights" by Rabbi Kaye); J.A. 128 (noting the study of the work of Oxford Christians by the C. S. Lewis Society).[3]

The United States Court of Appeals for the Fourth Circuit ruled that the funding guidelines violated the petitioners' First Amendment free speech rights. As a result of the guidelines, "religious expression . . . is never allowed to compete for funds with other forms of speech that might be indulged by University students." *Rosenberger*, 18 F.3d at 280. Despite the conspicuous Free Speech Clause violation, the court of appeals found that the University's discriminatory treatment of petitioners was "justifie[d]" by the Establishment Clause. *Id.* at 286. According to the court, reimbursement of Wide Awake's printing costs would have the "primary effect" of advancing religion and would cause excessive entanglement between the state and religion. *Id.* at 285, 286. Having found that the University's Establishment Clause fears justified the abridgement of free speech rights, the court of appeals rejected petitioners' challenge under 42 U.S.C. § 1983 that the guidelines are unconstitutional.

The court of appeals frankly acknowledged that respondents' "erection of a prior restraint against University funding of such 'religious activities' as the publication of religious expression in *Wide Awake* constitutes . . . a penalty" against the "exercise of constitutional rights [by petitioners] by withholding from their possessors an otherwise discretionary benefit." *Id.* at 281. In other words, the funding prohibition restrains petitioners "from gain-

[3] Ironically, a discussion of C. S. Lewis's views on free will and moral responsibility was a central feature of one *Wide Awake* issue. J.A. 132, 139-41.

ing access altogether to a funding source generally available to [other student organizations] not engaged in religious expression." *Id.* As the court of appeals correctly concluded, the funding prohibition "thus creates an uneven playing field on which the advantage is tilted towards [other student organizations] engaged in wholly secular modes of expression." *Id.* In this regard, the court accepted petitioners' contention that once respondents "have chosen to promulgate guidelines governing the allocation of funds that support student speech among competing student interests, such guidelines cannot condition funding awards on the content or viewpoint of a prospective recipient's speech." *Id.* at 279.

To determine whether different treatment of funding eligibility could be justified by admittedly content- and viewpoint-based factors, the court of appeals searched the guidelines' prohibition against funding "religious activities" for "a compelling state interest [that] is narrowly drawn to achieve that end." *Id.* at 281. The court found that avoiding the creation of an "establishment" of religion at the University may be characterized as "compelling." *Id.* at 282. Following the three-prong test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the court of appeals found that each prong of the test favored the funding proscription.

On the first prong, the court of appeals found that the respondents' purpose in denying SAF funding to "religious activities" was to comply with the University's educational function, which it characterized as a "facially secular legislative purpose." *Rosenberger*, 18 F.3d at 284. Put differently, the approved purpose lay "in preserving University funds for the institution's educational mission." *Id.* On the second prong, the court of appeals found that the primary effect of the SAF guidelines was neither to inhibit nor advance religion. The court stated that the University's policy of allowing petitioners "open access to campus facilities accords [them] ample opportunity to express their religious views," and that the respondents' funding policy "simply declines to take the additional step of actively subscribing University funds to *Wide Awake's* particular religious perspective." *Id.* at 285. The court further stated that "it would be difficult to view awarding SAF monies to *Wide Awake* as anything but state sponsorship—and therefore advancement—of religious belief." *Id.* On the third prong, the court of appeals found that the "potentially divisive political effect" of providing SAF monies to defray the publication cost of *Wide Awake* would create excessive government entanglement with religion. *Id.* at 286. The court held that such funding would "send an unmistakably clear signal that the University of Virginia supports Christian values and wishes to promote the wide promulgation of such values." *Id.*

SUMMARY OF THE ARGUMENT

The judgment below is incorrect. Because our Nation "is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us," special solicitude is given the First Amendment, which "does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). Fullest protection of free speech rights at our Nation's institutions of higher learning requires vigilant scrutiny of restrictions upon speech, not only in classrooms themselves but throughout the entire environs of university and college campuses. Foremost among the most protected expression of free speech is that which implicates the free exercise of religion, and this is no less true on university campuses than elsewhere. *See Healy v. James*, 408 U.S. 169, 180 (1972) ("[U]niversities are not enclaves immune from the sweep of the First Amendment."). Such expression is entitled to "special constitutional solicitude," and any proscription or regulation of speech because of its religious content is subject to "the most exacting scrutiny." *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). The court of appeals correctly held

that the University's viewpoint-based discrimination violates the Free Speech and Press Clause, but erred in holding that the Establishment Clause compels such a result.

At the heart of the Establishment Clause lies the principle that government may not favor or endorse one religion over another or religion over nonreligion in general. *Board of Educ. v. Grumet*, 114 S. Ct. 2481, 2491 (1994); *Lee v. Weisman*, 112 S. Ct. 2649, 2676 (1992) (Souter, Stevens, and O'Connor, JJ., concurring). By the same token, the Establishment Clause does not require government "to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." *Zorach v. Clauson*, 343 U.S. 306, 312 (1952). In seeking equal access to pooled student activity fees used to reimburse a broad spectrum of student organizations (including fifteen other student publications on campus) petitioners seek neither favoritism nor endorsement for their religious views but only to be included in a secular program on an equal footing with nonreligious fund recipients.

This Court has "frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges." *Grumet*, 114 S. Ct. at 2491. While the Establishment Clause commands neutrality to religious organizations and religious adherents in the dispensation of government benefits, the need for even-handed neutrality is underscored when disallowance of the benefit would otherwise constitute "overt viewpoint-based discrimination [that] contradicts the Speech Clause." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2149 (1993) (Kennedy, J., concurring). Here, viewpoint-based discrimination by virtue of University guidelines that proscribe funding for religious activities is undisputed. The court of appeals erred in finding that this discrimination was necessary to avoid an establishment of religion. Its convoluted analysis inappropriately focused

on the asserted justification for the guidelines rather than the factors under *Lemon* which, if satisfied, would have allowed petitioners' activities to be funded. The court below thereby ignored the precedents of this Court, which found the sharing of generally available benefits by religious and nonreligious alike wholly compatible with the Establishment Clause.

ARGUMENT

The court of appeals correctly determined that there was a violation of the Free Speech Clause. The court concluded that plaintiffs' publication of religious speech in *Wide Awake* was protected by the Speech and Press Clause. *Rosenberger*, 18 F.3d at 280. Further, the court agreed that, under SAF guidelines, "religious expression, such as that in *Wide Awake*, is never allowed to compete for funds with other forms of speech that might be indulged by University students." *Id.* The court recognized this as a prior restraint on religious expression in violation of the constitutional precept that, while a student organization has no right to funding by the University, funds generally available "must be distributed in a viewpoint-neutral manner, absent considerations of equal constitutional dignity." *Id.* at 281. Thus, the University's proscription against funding religious activities "creates an uneven playing field on which the advantage is tilted towards [student organizations] engaged in wholly secular modes of expression." *Id.* Hence, the court examined whether the University's proscription against funding "religious activities" was necessary to avoid "establishment" of religion at the University. *Id.* at 286.

Although it ultimately reached an erroneous conclusion, the court of appeals developed a proper decisionmaking framework for resolving the apparent conflict between the Free Speech and Establishment Clauses. The discussion of secular topics from a religious viewpoint within a public institution plainly implicates the Establishment Clause. *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987). Fur-

ther, the state has a compelling interest in avoiding an Establishment Clause violation that may justify an abridgment of free speech and press rights if the proscription is "narrowly drawn to achieve that end." *Widmar*, 454 U.S. at 270; *Lamb's Chapel*, 113 S. Ct. at 2148.

The fundamental problem in the court's analysis is that it did not follow this constitutional inquiry throughout its opinion. To determine whether the funding proscription was necessary to avoid an establishment of religion, the court below—following the precedents of this Court—should have required the University to demonstrate that the hypothetical funding of Wide Awake Productions would, under *Lemon*, violate the Establishment Clause. *Lamb's Chapel*, 113 S. Ct. at 2148; *Board of Educ. v. Mergens*, 496 U.S. 226, 248-49 (1990); *Widmar*, 454 U.S. at 271-75. In each of those cases, this Court hypothetically assumed equal access to the governmental benefit sought by a religious organization or religious adherents and required the state to prove that the shared access would be incompatible with the Establishment Clause. The state bears a " 'heavy burden' " in demonstrating that such incompatibility exists. *Widmar*, 454 U.S. at 270 n.7 (quoting *Healy*, 408 U.S. at 184).

Instead of such an analysis, the court below often switched its focus to whether the funding proscription itself were compatible with the Establishment Clause. This is not an insignificant or merely semantic difference but rather a drastic change in perspective with a predictably different outcome. If the University may legally abridge the acknowledged free speech rights of petitioners only by showing a compelling interest in avoiding an establishment of religion that would otherwise occur, it is up to the University to prove that funding petitioners would indeed create a situation "incompatible" with the Establishment Clause. Instead, the court of appeals focused upon whether the purpose and effect of the funding proscription furthered the University's policy of avoiding an unproven

establishment of religion. This unwarranted shift in focus led to a convoluted analysis of the *Lemon* criteria.

1. Nowhere was the court's analysis more troublesome in this respect than in the first prong of *Lemon*. Following "equal access" precedent, the court below should have evaluated the hypothetical SAF funding of Wide Awake Productions to determine whether a legitimate secular purpose could be found. The requirement of a "secular purpose" under this prong "aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality and acting with the intent of promoting a particular view in religious matters." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987). Instead, the court focused upon the "purpose that animated" the respondents' adoption of the SAF guidelines proscribing the funding of "religious activities" (*Rosenberger*, 18 F.3d at 283) and found the University had a secular purpose in "avoiding an establishment of religion" at the University (*id.* at 284). While true, this is irrelevant; the guidelines themselves were not under challenge as an establishment of religion but as an abridgement of free speech and press rights. Instead, the court of appeals should have considered whether the creation of a student activities fund generally benefiting numerous student organizations, including some which would comment on student activities and other matters of concern to students from a religious perspective, evidences a secular purpose by fulfilling the overall educational objectives of the University.

The answer to this inquiry is unmistakably affirmative. The funding of more than one hundred student organizations of such diverse composition, purposes, and objectives as exist at the University, hypothetically including Wide Awake Productions, clearly reflects a secular purpose. The purpose of the student activity fee is "to provide financial support for student organizations that are related to the educational purpose" of the University. J.A. 74. By ex-

amining the dozens of organizations and numerous publications already funded by the SAF (*Rosenberger*, 18 F.3d at 271), the court should have held that the University would not be "abandoning [the] secular purposes" of the SAF by the inclusion of *Wide Awake* among other student publications expressing views on activities or issues of interest to students. *Gillette v. United States*, 401 U.S. 437, 450 (1971). Indeed, the principal justification for collecting and disbursing student activities fees is "the educational necessity of exposing the university community to a diversity of responsible opinion," striving for balance and an adequate opportunity for opposing viewpoints. *Galda v. Rutgers*, 772 F.2d 1060, 1067 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986).

This Court has unambiguously held that a secular purpose exists in the creation of a university's open forum policy by which students can exchange ideas, including religious speech. *Widmar*, 454 U.S. at 271 & n.10. Nor would including *Wide Awake* among the host of other funded University publications involve any different "secular purpose" than that approved by this Court in guaranteeing equal access to governmental benefits by religious adherents at the public secondary school in *Mergens*, 496 U.S. at 248. In fact, a University policy treating religious viewpoints even-handedly would easily pass the first prong of *Lemon* because the "avowed purpose" of preventing discrimination "against religious and other types of speech . . . is undeniably secular." *Id.* at 249. This would be true even if a University official personally believed "that religious speech in particular was valuable and worthy of protection" inasmuch as a neutral policy would guarantee "equal access to both secular and religious speech." *Id.*; *see also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 40 (1989) (Scalia, J., dissenting) (stating that protection of free exercise concerns and maintenance of necessary neutrality toward religion have a secular purpose and effect).

2. In examining the second prong of *Lemon*, the court of appeals similarly erred in focusing on "whether the primary effect of the guidelines' restrictions is to inhibit or advance religion." *Rosenberger*, 18 F.3d at 284-85. Here again, the court's misguided focus was upon the SAF funding guidelines rather than the hypothetical funding of Wide Awake Productions. In effect, the court of appeals simply created a straw man to knock down; petitioner has never claimed that the First Amendment can "be metamorphosed into a promise" that the government will subsidize all speech. *Id.* at 277. Rather, petitioners merely assert that SAF funds available to student groups at the University generally must be distributed in a viewpoint-neutral manner, offering Wide Awake Productions an equal opportunity to compete for funding. The court of appeals therefore erred in casting the issue as whether the University's "refusal to subsidize [*Wide Awake*] directly" violates the Establishment Clause by inhibiting religion. *Id.* at 285.

In determining whether the receipt of SAF funds by petitioners would advance religion, the court of appeals correctly focused on the distribution of funds rather than the effect of the SAF guidelines but reached an erroneous conclusion. First, the court mischaracterized the SAF funds sought by petitioners and otherwise available to qualifying organizations on an equal basis consistent with educational objectives. Because the court mischaracterized SAF funding as a University "subsidy" (*e.g.*, *id.*), it drew erroneous conclusions regarding the degree of University support for *Wide Awake* or those other campus publications that are funded. In reality, the University's reimbursement of a student organization's publishing costs through the SAF is completely different in *nature and form* from the state financial aid to religious institutions disallowed in such "cash subsidy" cases as *Lemon*. Such subsidies involve an award of state aid from the general coffers of the government. SAF funding, by contrast, is merely the redistribution of student activity fees collected

for the specific purpose of funding a variety of student activities, including publications such as *Wide Awake*. Moreover, the funds are distributed directly to the creditors of student groups upon submission of expense vouchers to the SAF. *Id.* at 271. This assures that funds will not be misused for unapproved, nonsecular purposes and that the appearance of secular propriety is maintained. Like the tax exemption approved in *Walz v. Tax Comm'n of N.Y. City*, 397 U.S. 664 (1970), or the tax deduction approved in *Mueller v. Allen*, 463 U.S. 388 (1983), SAF disbursements involve no new, additional revenues being taken from the general tax coffers to support religious organizations or activities. Rather, the University's reimbursement of student expenses is a closed-loop system in which only revenues generated for the entire spectrum of student activities are utilized to support those activities. The University acts as an administrator and conduit in assuring that the student fees are appropriately distributed in accordance with educational objectives and, therefore, is obligated to obey the Free Speech and Press Clause, but the reimbursement sought by petitioners for their publication is not truly a subsidy much less "government largesse." *Rosenberger*, 18 F.3d at 279.

Even characterizing the SAF funding as a "subsidy," if it were such, is not constitutionally dispositive. For example, although every tax exemption constitutes a subsidy in some sense, this Court has upheld such a subsidy "[i]nsofar as that subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end," even though "religious groups benefit incidentally." *Texas Monthly*, 489 U.S. at 14-15. It could not be more clear that the government may lawfully reimburse private persons for expenses incurred in fulfilling the secular purposes of education even though religion may be incidentally advanced. *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 486-87 (1986); *Everson v. Board of Educ.*, 330 U.S. 1, 17-18 (1947). Accordingly, the court of

appeals erred in treating the funding element of the SAF program as dispositive under the second prong of *Lemon*.

Further, the *governmental involvement* in SAF funding is far more passive and removed than with the grant of a cash subsidy by the state to a religious institution. As the court below correctly found, the University, in effect, oversees the redistribution of activity fees collected from students and deposited in the SAF to support a broad spectrum of student organizations, activities, and publications at the University. *Rosenberger*, 18 F.3d at 271. But primary responsibility for distribution of funds belongs to the University's Student Council. *Id.* Only after internal appeals are exhausted before the full Student Council may the organization denied funding seek review and a final decision by the University's Student Activities Committee, a faculty body chaired by the designee of the Vice President for Student Affairs.

Therefore, if Wide Awake Productions had not been denied funding by virtue of the guidelines, only the Student Council would have authorized the funding, and no University official would have been directly involved. The court of appeals gave little or no weight to the actual decisionmaking process in SAF fund distribution in determining whether religion would be advanced by the government if Wide Awake Productions were granted funds on an equal footing with other eligible groups. For this reason, the court of appeals exaggerated the extent to which the University actually placed, or may be perceived to place, its imprimatur upon the distribution of SAF funds so as to advance religion.

The court of appeals also misinterpreted this Court's decisions defining the constitutionally permissible benefits that religious organizations may achieve incidentally through the fulfillment of secular objectives. The court below focused upon Wide Awake Productions as an individual recipient of reimbursement for its publication, but ignored the educational benefits to the University in

the larger context in which the SAF supports a broad spectrum of activities of which *Wide Awake* would be but one. *Id.* at 284-85. The University would not have been making a special grant to petitioners or to students engaged solely in religious activities. Rather, the University has funded over a hundred diverse organizations, some that have pedantic, philosophic, or even ontologic concerns, and others that are more mundane. All, however, are broadly encompassed by the University's educational purpose in fostering thought, understanding, and expression.

Any incidental benefit to religion in the University's achievement of this secular objective does not run afoul of the Establishment Clause. As this Court has held:

> The nonsectarian aims of government and the interests of religious groups often overlap, and this Court has never required that public authorities refrain from implementing reasonable measures to advance legitimate secular goals *merely because they would thereby relieve religious groups of costs they would otherwise incur.*

Texas Monthly, 489 U.S. at 10 (emphasis added). Or, as more recently explained:

> [This Court has] consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462, 2466 (1993).

To assure that no impermissible advancement of religion or excessive entanglement with religion exists, this Court has required a factual demonstration of "the general availability of any benefit provided religious groups or individuals." *Grumet*, 114 S. Ct. at 2491. As in earlier cases, the availability of funding here "to a broad

class of nonreligious as well as religious speakers," among "over 100 recognized student groups" (*Rosenberger*, 18 F.3d at 271) at the University demonstrates secularity in the "provision of benefits to so broad a spectrum of groups." *Widmar*, 454 U.S. at 274; *see also Grumet*, 114 S. Ct. at 2491-92; *Lamb's Chapel*, 113 S. Ct. at 2148; *Mergens*, 496 U.S. at 248.

Nor is the court of appeals' characterization of petitioners' activities as "proselytizing" (*Rosenberger*, 18 F.3d at 285) constitutionally relevant. This Court's precedents "plainly contemplate that on occasion some advancement of religion will result from governmental action." *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984). To render Wide Awake Productions ineligible for funding is not constitutionally compelled just because Wide Awake expresses a religious perspective on issues and topics of student interest frequently addressed by other student groups, even if religion is thereby advanced. As this Court held in *Lamb's Chapel*, when school authorities sought to restrict use of school property "for the purpose of proselytizing," such reasoning cannot be defended "to deny the presentation of a *religious point of view* about a subject the [School] District *otherwise makes open to discussion* on District property." 113 S. Ct. at 2148 (emphasis added). Whether characterized as proselytizing or discussing the same subject as others but from a religious point of view, the funding sought by petitions "is not unconstitutional simply because it *allows* [petitioners] to advance religion"; there are no forbidden "effects" under *Lemon* unless "the *government itself* has advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337.

Thus, the University cannot constitutionally fund a discussion, for example, of homosexuality or the ideas of C. S. Lewis (J.A. 122, 128), while excluding petitioners from the same funding to discuss the same issues from a different perspective (*Rosenberger*, 18 F.3d at 272). The Establishment Clause "must not be construed as some

sort of homogenizing solvent that forces . . . religious groups" to choose between their religious ideals and mainstream nonreligious or irreligious culture at the risk of exclusion from benefits generally available to others. *Grumet*, 114 S. Ct. at 2505 (Kennedy, J., concurring).

3. The court of appeals' examination of the third prong of *Lemon* is also in error. Owing to the *nature and form* of the SAF as a pool of fees collected and reallocated for the very purpose of funding student activities (as well as the limited *governmental involvement* in overseeing this student-administered process), there is far less potential for "excessive entanglement" than the court below found. Because University officials are generally removed from the allocation and disbursement process (except to assure that funds are used only for approved purposes) and certainly have little to do with the funded activities themselves, the University would not in fact be associated with the publication of *Wide Awake*. Accordingly, there would be no "purposeful and forbidden 'fusion of governmental and religious functions' " like that condemned in *Grumet*, 114 S. Ct. at 2490 (quoting *Larkin v. Grendel's Den*, 459 U.S. 116, 126 (1982)).

To the contrary, as in *Widmar* and *Mergens*, " 'the University would risk greater "entanglement" by attempting to enforce its exclusion of religious activities from otherwise available benefits.' " *Mergens*, 496 U.S. at 248 (quoting *Widmar*, 454 U.S. at 272 n.11). Deciding which publications are religious or how many articles of a religious nature render the publication or a particular issue "religious" is itself an entanglement best avoided. As precedent further instructs, the University's "fear of a mistaken inference of endorsement is largely self-imposed, because the school itself has control over any impressions it gives its students." *Id.* at 251 (citing *Widmar*, 454 U.S. at 274 n.14). By explanation or even express disclaimers in University funding guidelines, funding applications, the student handbook, or other means, "students will reasonably understand that the school's [funding of

Wide Awake] . . . evinces neutrality toward, rather than endorsement of, religious speech. *Id.*

The court of appeals disregarded the University's ability to disassociate itself from funded activities in citing the "potentially divisive political effect" of funding Wide Awake Productions as the principal feature of "excessive entanglement." *Rosenberger*, 18 F.3d at 286. The court predicted that the "possibility of a continuing annual appropriation for the benefit of a single religion carries the potential for seriously divisive political consequences at the University of Virginia." *Id.* The court of appeals held that, because *Wide Awake* is "pervasively devoted to the discussion and advancement of an avowedly Christian theological and personal philosophy," funding the publication would "send an unmistakably clear signal that the University of Virginia supports Christian values and wishes to promote the wide promulgation of such values." *Id.*

In so holding, the court below not only overlooked the University's control over student perceptions but also disregarded this Court's longstanding recognition that University students possess sufficient maturity and understanding to distinguish student-initiated speech from that which the University sponsors or endorses. Nowhere has this Court made the distinction more clear than in *Widmar*, in which this Court aptly observed:

> University students are, of course young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion. . . . In light of the large number of groups meeting on campus, . . . we doubt students could draw any reasonable inference of University support from the mere fact of a campus meeting place. The University's student handbook already notes that the University's name will not "be identified in any way with the aims, policies, programs, or opinions of any organization or its members."

454 U.S. at 274 n.14. Similarly, in *Tilton v. Richardson*, 403 U.S. 672, 685 (1971), this Court underscored the "significant differences" between the attitude and understanding of university students exposed to religious ideas and that of students at lower levels. The Court stated:

> There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. Common observation would seem to support that view, and Congress may well have entertained it. The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations. Furthermore, by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines.

Id. at 686.

Indeed, this Court explictly rejected the reasoning relied upon by the court below in holding in *Mergens* that the Equal Access Act, 20 U.S.C. §§ 4071-4074, does not violate the Establishment Clause. There, school authorities contended that "because the student religious meetings are held under school aegis" and because of complusory school attendance laws, "an objective observer in the position of a secondary school student will perceive official school support for such religious meetings." *Mergens*, 496 U.S. at 249. Distinguishing such a case from one involving "impressionable children," this Court held:

> [T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.

> . . . The proposition that schools do not endorse everything they fail to censor is not complicated.

Id. at 250.[4]

Indeed, the very reasons this Court has historically championed the free exercise rights of students also explain why state-sponsored indoctrination would not result or be perceived by funding the publication of *Wide Awake*. The University environs are the " 'marketplace of ideas' " (*Healy*, 408 U.S. at 180 (quoting *Keyishian*, 385 U.S. at 603)), which bespeaks "this Nation's dedication to safeguarding academic freedom" (*id.* at 180-81). At times, this academic freedom may very well lead students, as "adults who are members of the college or university community," to express "values, views, and ideologies that are at war with the ones which the college has traditionally espoused or indoctrinated." *Id.* at 197 (Douglas, J., concurring). For these reasons, "[c]ollege students are less susceptible to religious indoctrination; college courses tend to entail an internal discipline that inherently limits the opportunities for sectarian influence; and a high degree of academic freedom tends to prevail at the college level." *Roemer v. Board of Pub. Works*, 426 U.S. 736, 750 (1976).

In numerous Establishment Clause cases, the Justices of this Court have reaffirmed that the maturity of college-age students "may affect the constitutional analysis of a particular public school policy." *Edwards*, 482 U.S. at 607 n.7 (Powell, J., concurring); *see also Bowen v.*

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[4] In fact, this Court observed that Congress itself rejected the argument "that high school students are likely to confuse an equal access policy with state sponsorship of religion," a legislative judgment based in part on empirical determinations. *Mergens*, 496 U.S. at 250. Harkening back to *Widmar*, Justice Marshall stated that, in a university setting at which "a school emphasizes the autonomy of its students, . . . there is a corresponding decrease in the likelihood that student speech will be regarded as school speech." *Id.* at 267 (Marshall, J., concurring).

Kendrick, 487 U.S. 589, 638 (1988) (Blackmun, J., dissenting) (stating that college students are "less impressionable and less susceptible to religious indoctrination"); *Bender v. Willamsport Area Sch. Dist.,* 475 U.S. 534, 556 (1986) (Powell, J., dissenting) (noting that college students can discern that a university's policy is one of neutrality towards religion); *Kramer v. Union Free Sch. Dist.,* 395 U.S. 621, 637 (1969) (Stewart, J., dissenting) ("[S]ome college students under 21 may be both better informed and more passionately interested in political affairs than many adults.").

The court of appeals below ignored these important distinctions and erroneously assumed that any involvement by the University in providing benefits to an avowedly religious organization on an equal footing with all others would automatically be perceived as state sponsorship of religion. The court below therefore erred in attributing to colleges and universities "the particular concerns that arise [with Establishment Clause cases] in the context of public elementary and secondary schools." *Edwards,* 482 U.S. at 585. Failing to take cognizance of the University setting, the court of appeals improperly treated University students like "impressionable" youths, subject to the authority and coercive power of mandatory atttendance. *Id.* at 584.

CONCLUSION

For the foregoing reasons, *amicus* ISI urges this Court to reverse the judgment below.

Respectfully submitted,

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